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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

FREDERICK T. ZUBER, ET AL., *Petitioners,*

v.

RUSSELL ALLEN, ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners[1] pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above case on September 23, 1968 (Docket No. 21,141). In a companion case heard and decided on the same date, the Solicitor General has received

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[1] Petitioners comprise the following seven individuals: Frederick T. Zuber, George R. Medeiros, Herbert Kallman, Alexander F. Tripp, Kendall F. Crocker II, Carl W. Proctor and John T. Savage. Respondents initially comprised five individual plaintiffs below: Russell Allen, James O. Phillips, Dwight Burnham, Dwight Bessette, and Henry La Flam. Subsequent to the filing of their complaint, 163 other individuals were added as plaintiffs before the district court.

an extension of time from this Court until February 20, 1969 within which to consider the request of the Secretary of Agriculture that a petition for a writ of certiorari to review the same judgment be filed.[2]

OPINION BELOW

The order of the district court granting the plaintiffs' motion for summary judgment and judgment for declaratory and injunctive relief is unreported and is printed in Appendix B hereto at pages 21a-29a. The opinion and judgment of the Circuit Court of Appeals are unreported as of this date. They are reprinted in full in Appendix B hereto at pages 30a-62a.

JURISDICTION

The opinion and judgment of the Circuit Court were dated and entered on September 23, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the farm location differential provisions of the Federal milk marketing order for the Massachusetts-Rhode Island area are authorized by the Agricultural Marketing Agreement Act of 1937?

2. Whether those farm location differential provisions are supported by substantial evidence?

3. Whether, if the farm location differential provisions are not sustained, the case must be remanded to enable the Secretary of Agriculture either to review or elucidate further the premises of the differential provisions, or to determine if the order without the differ-

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[2] *Freeman* v. *Allen, et al.* (Docket No. 21,308).

ential provisions effectuates the policy of the Act or to modify the order so as to effectuate that policy?

4. If the farm location differential provisions are deemed invalid, whether the sums representing the differential which have been and are being escrowed should be paid to those producers who have been receiving and relying on them for over thirty years?

PERTINENT STATUTORY AND REGULATORY PROVISIONS

The statutory provisions defining the authority of the Secretary of Agriculture to issue milk orders under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 601, *et seq.*) are set out in Appendix A hereto. The principal provisions involved in the instant case are §§ 608c(5)(A) and (B) set out at pages 3a-4a of Appendix A hereto.

The "farm location differential" or "nearby differential" in the Secretary's milk order for the Massachusetts-Rhode Island marketing area are set out, as included in the Secretary's 1964 Order, at pages 10a-13a of Appendix A hereto. The Secretary's findings relevant thereto are also printed at pages 13a-21a of Appendix A.

STATEMENT

This action was initiated by respondents now 168 Vermont dairy farmers, challenging a long-standing provision of the Federal milk marketing order for the Massachusetts-Rhode Island area. The jurisdiction of the district court was invoked because the case involves a question under a law relating to commerce, the Agricultural Marketing Agreement Act of 1937 ("the Act"). Respondents challenged the statutory author-

ity of the Secretary of Agriculture to provide in the marketing order for farm location differential (commonly called "nearby differential") minimum price adjustments. These adjustments have been made in favor of farmers located close to principal consumption centers. Respondents are ineligible for such adjustments in view of their distant locations from the market's core.

The marketing order provision under attack has been an integral part of Federal milk orders relating to all or a portion of the Massachusetts-Rhode Island area for over thirty years. Prior to the commencement of Federal regulation in 1933, adjustments equivalent to the differential were made in favor of "nearby" farmers as part of the classified pricing and pooling concepts developed over the prior twenty year period. These differential price adjustments were preserved by the first Federal license issued in 1933 for the Boston area under the Agricultural Adjustment Act. They were continued in a succeeding license in 1934 and again in the first milk marketing order for Boston promulgated in 1936. In the 1937 Boston milk order, the differential was again preserved, in a form virtually the same as that involved here. It simply provided, as it does today, for the adjustments of a forty-six cent differential to producers with farms located near the hub of the market, and a twenty-three cent differential to producers with farms situated at an intermediate distance.[3]

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[3] Most of the milk farmers in Massachusetts, all of those in Rhode Island and those in portions of Connecticut, Vermont and New Hampshire are included under the 1964 order in the forty-six cent zone. Producers whose farms are located in portions of Maine, Massachusetts, New Hampshire and Vermont are in the twenty-three cent zone.

The 1937 Boston order, as well as a parallel New York order, shortly became the subject of substantial litigation in which both the constitutionality of the Agricultural Marketing Agreement Act and the validity of certain order provisions were challenged. Not only was the constitutionality of the Act upheld,[4] but the farm location differential provisions of the New York and Greater Boston orders were explicitly approved by this Court and the Court of Appeals for the First Circuit respectively.[5] Consistently thereafter, the Secretary has included the differential provision in all orders for subsidiary New England markets as regulation has been extended to them. In 1964, the orders for three of these markets, Worcester, Springfield and Southeastern New England (Rhode Island and the Fall River and New Bedford areas) were consolidated with the Greater Boston order into a single order containing the same farm location differential. As in the case of all the prior orders, the 1964 order was promulgated in proposed form and submitted to the farmers in the area for a vote. It was approved by 89.3 percent of the 9,542 farmers then marketing in the area and therefore eligible to participate in the referendum. Over two-thirds of the farmers voting were not eligible for

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[4] *H. P. Hood & Sons, Inc.* v. *United States*, 307 U.S. 588; *United States* v. *Rock Royal Co-op., Inc.*, 307 U.S. 533.

[5] *United States* v. *Rock Royal Co-op., Inc.*, 307 U.S. at 567; *Green Valley Creamery, Inc.* v. *United States*, 108 F. 2d 342 (C.A. 1). For convenience, the opinion of the Court of Appeals for the First Circuit in *Green Valley* is printed at Appendix C, *infra*, pp. 63a-72a.

the differential.[6] (At present, slightly over eight thousand individual farmers serve the Massachusetts-Rhode Island milk market of which approximately two thousand are nearby farmers entitled to the differential.)

In 1966, certain amendments were proposed to the Massachusetts-Rhode Island order, among them one to delete the differential. Hearings had been held, and the proposals were pending before the Secretary when the present action was filed on December 27, 1966, just over one month following a decision by the Court of Appeals for the District of Columbia Circuit in *Blair* v. *Freeman*[7] striking down the farm location differential in the New York-New Jersey milk marketing order. Respondents opted not to participate in the 1966 proceedings before the Secretary and resisted the Secretary's request of the district court to hold the proceedings in abeyance or to dismiss them pending an administrative determination. The district court rejected the Secretary's request and, thereafter, relying wholly on the *Blair* decision, granted respondent's motion for summary judgment against the Secretary. Subsequent to entry of that judgment, the Secretary issued a recommended decision on the pending proposals in the proceedings before him, and while noting the decision of the district court, concluded that the differential "should be continued"[8] on the basis of

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[6] 29 Fed. Reg. 12237. The Agricultural Marketing Agreement Act requires that the Secretary in issuing an order must find that it will tend to effectuate the Act's policy, *i.e.*, establish and maintain orderly marketing conditions. Moreover, under the Act the order to become effective must be approved by at least two-thirds of the producers whose milk is marketed in the area.

[7] 370 F. 2d 229 (C.A.D.C.). No petition for certiorari was filed in the *Blair* case.

[8] 32 Fed. Reg. 9918-19.

the record, reliance by the "nearby" farmers consistently over the years on the differential in formulating their business decisions and the Secretary's continuing belief in the validity of the differential as explicitly approved by the Court of Appeals for the First Circuit in *Green Valley*.

Promptly after this action was instituted, the district court entered a preliminary injunction against the differential's enforcement, requiring the Secretary to escrow the sums representing the price adjustments effected by the differential. Shortly thereafter, petitioners, presently seven "nearby" dairy farmers who are entitled to receive the differential, moved to intervene as party defendants on behalf of themselves and the approximately 2,000 other "nearby" producers in the marketing area. Upon denial of their requested intervention, they appealed. Their appeal was pending at the time the district court entered summary judgment against the Secretary. Thereafter, the Court of Appeals permitted petitioners to intervene for the sole purpose of prosecuting an appeal from the district court's final judgment on condition that their appeal on intervention would become moot.[9] The Secretary

[9] Petitioners had claimed before the district court a right to intervene under Rules 19 and 24 of the Federal Rules of Civil Procedure on the grounds, among others, that they were necessary parties and had a direct interest and claim in the escrow fund. Following the lower court's judgment, petitioners sought to continue the escrow arrangement in aid of their appeal on intervention. While the Court of Appeals denied that relief, it offered the petitioners the option, by mooting their appeal on intervention, to appeal from the merits of the lower court's judgment and to seek a preservation of the status quo from the lower court which had denied that relief to the Secretary. *Zuber* v. *Allen*, 387 F. 2d 862 (C.A.D.C.). Petitioners thereafter prosecuted an appeal and obtained a continuation of the escrow arrangement pending their appeal.

subsequently perfected an appeal which was heard and decided together with petitioners' appeal.

The court below affirmed the judgment of the district court, primarily upon the authority of its opinion in *Blair* v. *Freeman,* and rejected the contentions of both the Secretary and petitioners that, at a minimum, the matter should be remanded to the Secretary. While the court recognized that the First Circuit in *Green Valley* had provided "in language at least, an explicit judicial approval of the farm location differential," it nonetheless predicated affirmance on its contrary interpretation of the provisions of the Agricultural Marketing Agreement Act. The lower court's interpretation of the Act was directly in conflict with a decision of the District Court for the Northern District of New York which, less than two months earlier, following an eight day trial in which extensive evidence regarding the legislative and administrative history of the Act was heard, considered and found to be determinative, had sustained a substantially identical differential in the Federal milk marketing order for Connecticut.[10]

To date, approximately five and one-half million dollars of net nearby differential adjustments have been escrowed.[11] Accretions to the escrow at a rate of approximately $250,000 monthly are taking place. By

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[10] *Cranston* v. *Freeman,* 290 F. Supp. 785 (N.D.N.Y.), appeal docketed, Nos. 32,793-99, C.A. 2, October 28, 1968. For convenience, the opinion of the district court in *Cranston* is printed at Appendix D, *infra,* pp. 73a-132a.

[11] Under the decision of the lower court, the major portion of the escrow fund, representing amounts accrued after the entry of final judgment by the district court on June 15, 1967 would be distributed to the distant farmers; the balance would be remitted to the nearby farmers.

order dated December 2, 1968, the lower court has stayed its mandate and continued the escrow arrangements until disposition by this Court.

REASONS FOR GRANTING THE WRIT

The decision of the court below is at odds with a well-established and consistent construction of the Agricultural Marketing Agreement Act of 1937 (the "Act"), 7 U.S.C. § 601 *et seq.*, a construction which has been maintained by the Secretary of Agriculture for over thirty years. The lower court's construction depends on a congressional intent neither expressed nor implied in the plain language of the Act and is refuted by analysis of the total environment in which Congress acted. The pervasive implications of the ruling below are detrimental to the effective and orderly regulation of milk marketing not only in the Massachusetts-Rhode Island area directly involved but in other milk markets throughout the nation. The economic livelihood of approximately 2000 New England dairy farmers entitled to the differential is at stake here, as is the viability of substantial segments of the agricultural economies of the New England states. For the milk-consuming public in these states, the decision below poses the prospect of serious instabilities in milk marketing patterns and in price levels. Furthermore, as a result of the severe limits placed on the Secretary's statutory authority by the ruling below, the validity of price adjustment provisions of many other milk marketing orders now in force elsewhere in the country have become open to serious question. In addition to overruling the Secretary's long-standing construction of the Act, the lower court's holding is directly contrary to a ruling of the Court of Appeals for the First

Circuit shortly after the statute was enacted which sustained the predecessor of the differential held illegal here.[12] The ruling below also is contrary to a most recent decision of the Federal District Court for the Northern District of New York[13] which, following thorough exploration in an eight-day trial, upheld a substantially identical differential provision in the Federal milk order for Connecticut. The holding below is equally inconsistent in principle with the leading decision of this Court in *United States* v. *Rock Royal Co-op., Inc.*, 307 U.S. 533, earlier affirming the Secretary's authority to provide for farm location differential adjustments in favor of nearby farmers.

1. *The importance of the Federal question involved.* For over 30 years, the Secretary of Agriculture has relied on his authority under the Agricultural Marketing Agreement Act of 1937 to include farm location differentials in milk orders covering large metropolitan areas in the northeastern United States and in the Midwest. His authority is rooted in the language of the Act itself and in its legislative history. The essence of the statutory scheme is an authorization to the Secretary to issue milk marketing orders, providing for uniform minimum prices payable to all producers for their milk whether the particular milk for which such price is set is used in its most valuable form as fluid milk or in the manufacture of milk products such as butter, cheese or ice cream. Section 8c (5) (B) (ii) of the Act, 7 U.S. C. § 608c(5) (B) (ii), is at the core of the controversy here. It authorizes the Secretary to provide for the payment to the milk pro-

[12] *Green Valley Creamery, Inc.* v. *United States*, n. 5 *supra*.

[13] *Cranston* v. *Freeman*, n. 10 *supra*.

ducers for their milk deliveries of uniform prices "irrespective of the uses made of such milk by the individual handler to whom it is delivered," subject to certain adjustments. Among the permitted adjustments are those for "(a) volume, market and production differentials customarily applied by the handlers subject to such order" and "(c) the locations at which delivery of such milk is made."

Relying on this statutory foundation, the Secretary deemed it essential in the interest of orderly marketing conditions to provide in the earliest Federal milk orders in New England for a farm location differential and to preserve that differential in a substantially identical form over the years as Federal milk regulation was extended over greater areas of New England. Despite this consistent and long-standing interpretation by the Secretary in the intricate complex of milk marketing regulation, the court below has failed to accord the Secretary's construction the "considerable weight" [14] to which it is entitled. Instead, it has relied upon a single excerpt from the Act's legislative history to reach a conclusion which is the antithesis of the congressional intent reflected in the hearings, debates, antecedent regulations and the committee reports as a whole (App. 94a-104a). Moreover, the court below has substituted its own views for those of the Secretary regarding the economics of milk marketing on the basis of an incomplete record and has engaged in factual suppositions which reflect a lack of judicial comprehension regarding "an industry of labyrinthean complexity." [15]

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[14] *Lewes Dairy, Inc.* v. *Freeman*, 401 F. 2d 308 (C.A. 3); *Ideal Farms, Inc.* v. *Benson*, 288 F. 2d 608 (C.A. 3).

[15] *Blair* v. *Freeman*, 370 F. 2d at 239.

For example, the court's "guess" concerning the advent of bulk tank trucking is wrong (n. 36, App. 54a). See 23 Fed. Reg. 8227 (1958) demonstrating that the use of bulk tank trucking was a much more recent occurrence. The court also is factually in error in stating:

> ". . . the differential was never one payable over and above the transportation differential available to distant producers who delivered to a nearby zone" (App. 48a-49a). See H.R. Doc. 501, 74th Cong., 2d Sess. 183-4 (1936) establishing the contrary.

Since 1935, Congress on various occasions has been advised of the inclusion in milk orders of farm location differentials,[16] but has made no suggestion that such differentials were impermissible or that an amendment to the Act was required to authorize them. Congress' long acquiescence in the Secretary's widespread employment of farm location differentials lends great weight to the conclusion that the differentials are consistent with the authority Congress intended to confer upon the Secretary. *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148; *Udall* v. *Tallman*, 380 U.S. 1, 16.

The importance of the question of Federal law involved here is accentuated by practical, economic effects if the judgment below is permitted to stand. In the Massachusetts-Rhode Island market alone, approximately 2,000 farmers in 1967 qualified for the differential amounts which accumulated in escrow at over a $3,000,000 rate in that year and now represent a total

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[16] See, *e.g.*, *Report of the Federal Trade Commission on the Distribution and Sale of Milk and Milk Products*, H.R. Doc. 501, 74th Cong., 2d Sess. 183-84 and more recently, *Hearings Before Subcommittee on Dairy and Poultry, House Committee Agriculture*, 89th Cong., 1st Sess. (1965) at p. 143.

of over $5.5 million. This averages almost $1,500 annually per nearby farmer which, with the slim margins enjoyed by most dairy farmers, will make the difference in many operations between profit and loss. For a period of more than thirty years both nearby and non-nearby farmers in the New England markets have developed their herds, planned their farming operations and made their business decisions and investments on the assumption that the farm location differential provision, which reflected traditional pricing patterns, was valid and would be continued.[17] Elimination of the differential can be expected sharply to accelerate an already significant rate of decline in nearby dairy operations. Such a decline portends serious, adverse effects for a sizable segment of the agricultural economies of Massachusetts, Rhode Island and neighboring states, and for the milk consuming public

[17] In light of this reliance, petitioners and the Secretary urged below that, at a minimum, the case be remanded to the Secretary. Instead, the lower court substituted its own views of the economics of milk marketing and of orderly marketing regulation, erroneously assuming a complete lack of viable economic aspects of the differential in the marketplace. In so doing, the court below not only undertook the burden of making the administrative determinations but further went on to order the disposition of an escrow fund now totaling over $5.5 million, diverting by far the major portion of the fund, as a windfall, to a group of distant farmers who, while voting to approve the differential since the inception of Federal regulation, have neither relied upon it nor received it. Such determinations regarding the distribution of the fund and the totality of the milk order provisions are matters which alone are for the Secretary, at least in the first instance. This Court has in the past upheld the power of cognizant administrative officials, rather than the courts, to remold the situation and to determine the disposition of escrow amounts where the validity of administrative action has been successfully challenged. *Addison* v. *Holly Hills Fruit Products*, 322 U.S. 607; *United States* v. *Morgan*, 307 U.S. 183.

in those states through a rapid elimination of a substantial portion of their sources of milk supply.[18]

The issues presented for review here are not limited in application to the Massachusetts-Rhode Island area. A substantially identical farm location differential is an integral part of Federal milk regulation in Connecticut under a discrete marketing order and has recently been sustained as a valid exercise of the Secretary's authority in that market.[19] Moreover, in the recent past, the Secretary has had occasion to use farm location differentials in two of the largest markets in the country, *i.e.,* New York and Chicago.

In petitioners' view, other implications of the ruling below may constitute a serious hindrance to orderly and effective regulation in milk markets throughout the nation. Federal milk orders in practically all markets incorporate a range of differentials. Most, if not all, of these differentials reflect, at least in part, the economic factor of value contributed by fluid use. Yet, the court below has interdicted any differential which is related to "sales advantages for fluid use" (App.

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[18] In view of the very direct economic consequences for the nearby farmers in the market, which are highlighted by their claim to the over $5.5 million of net differential amounts currently in escrow, the district court's refusal to permit petitioners to participate in the proceedings before that court constitutes a striking paradox and one which was not and could not have been remedied by an intervention limited to appellate procedures after the trial court's record had been closed. Where representatives of the nearby producers were permitted to participate as full parties before the trial court, a meaningful and complete record was created and the differential was upheld as an authorized exercise of the Secretary's statutory powers. *Cranston* v. *Freeman*, n. 10 *supra.*

[19] *Cranston* v. *Freeman, Id.*

52a) or reflects "any reliance whatsoever upon the prohibited factor of fluid use patterns." (App. 35a). Adjustments which the Secretary makes to the uniform price in Federal milk orders normally result in a higher price to some farmers than to others. These may now be subject to challenge on the grounds that the adjustments are premised at least in part on an enhancement of the value of the milk for fluid use.[20] A second implication of the lower court's ruling is equally fraught with problems for the Secretary's regulatory program. In interpreting those provisions of the Act which authorize adjustments for "volume, market and production differentials customarily applied," 7 U.S.C. § 608c(5)(A) and (B) (ii), the court below has, in effect ruled that the discussion in the congressional committee reports[21] of these terms limits the Secretary to those differentials which the reports describe and to no others. (App. 54a, 57a). If the ruling below remains unchanged, numerous differentials in existing market orders which fall outside the illustrative discussion in the committee reports, could also be invalidated. Even a "market differential" expressly noted

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[20] For example, many Federal milk orders today include a butterfat differential which is paid because it enhances the value of the milk for fluid use. Thus, the Secretary, in determining to adopt such a differential, has stated:

> "According to the findings of the study, the proposed factor would reflect more accurately the actual value of butterfat in terms of its use as fluid cream. Since the butterfat differential has been related historically to its fluid cream value, the proposed factor should be adopted." 16 Fed. Reg. 9255 (1951 Greater Boston Order).

The lower court's analysis here, if permitted to stand, might well furnish the basis for condemning this differential.

[21] H.R. Rep. No. 1241; S. Rep. No. 1011, 74th Cong., 1st Sess. 10 (1935).

and approved by this Court could succumb. See *Brannan* v. *Stark*, 342 U.S. 451 at 466 in which this Court stated:

> "Many provisions for payments to cooperatives appearing in other orders have been of a kind specifically authorized by the statute. Thus, the provision of the first Boston Milk Order for a price differential as between cooperative milk and noncooperative milk was upheld in Green Valley Creamery v. United States, as a 'market differential' authorized by § 8(5)(A)(1)." (Footnote omitted.)

2. *The conflict between the decision below and the decision of the First Circuit Court of Appeals in Green Valley Creamery, Inc.* v. *United States, 108 F.2d 342 (C.A. 1).* The decision of the court below is directly in conflict with the *Green Valley* decision. The court below held that the farm location differential of the Massachusetts-Rhode Island order was unauthorized under the Act. The *Green Valley* court, shortly after the Act was passed, explicity approved a substantially identical differential contained in the Boston milk maketing order (the predecessor to the Massachusetts-Rhode Island order) as an authorized customary market differential under the Act (App. 71a).

The *Green Valley* court noted that the factors relied upon in support of the differential were "greater accessibility to the market," "greater dependability," "a more uniform level of production throughout the year," "similar differentials" in the Boston market for many years, and the fact that nearby producers were "also potential dealers." (App. 70a). Judge Magruder concluded that:

> ". . . the differentials can readily be sustained under Section 8c (5) (B) (ii) (a) of the Act as

> market differentials which had customarily been applied by handlers subject to the Order. They are called 'location differentials' in the Order, and so they are; but they are also customary market differentials based upon the location of farms nearby the market." 108 F.2d at 346 (App. 71a).

The court below struck down the same nearby differential in the successor order, the Massachusetts-Rhode Island order, citing as the basis for holding the differential invalid the very advantages and factors relating to nearby milk that the *Green Valley* court relied upon as justifications for the differential.[22]

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[22] The factors enumerated by the *Green Valley* court are compared below with conflicting views of the lower court:

Green Valley	*Zuber*
". . . differentials in favor of nearby farms had existed in the Boston market for many years." (App. 70a).	". . . those 'historical price relationships by location' were the fluid use advantages which the Act expressly condemns." (App. 36a).
"greater accessibility to the market" and the fact that "[nearby] producers were also potential dealers." (App. 70a).	"The reason for this 'economic position' was, as the Secretary recognized, 'availability *for Class I* use.' We are unable to distinguish this factor from the consideration of historical fluid use patterns condemned in *Blair.*" (App. 39a).
	"Those direct marketing opportunities were, of course, for fluid use at Class I prices." (App. 43a).
". . . greater dependability as sources of supply, because, as experience showed, the nearby farms had a more uniform level of production throughout the year." (App. 70a).	"This resort to seasonability, then, was not so much in explanation of historically higher prices but rather in recognition of the fact that the nearby farmers', evenly produced milk had been sold primarily at Class I prices, *i.e.*, for fluid use." (App. 42a).

Significantly, the *Green Valley* court had a complete evidentiary record relating to the operation of the milk industry in the area and to the legislative history of the Act to aid it in comprehending the intricate complex of milk marketing regulation. The court below had no such evidentiary record before it that would have placed it in an appropriate position properly to challenge the expertise of the Secretary and his Department acquired over thirty years of regulation and as participants in the drafting of the 1935 and the 1937 Acts.

The court below dismissed the *Green Valley* approval of the farm location differential in the predecessor Boston order as dictum (App. 51a) while, at the same time, acknowledging that it was "in language at least, an explicit judicial approval of the farm location differential." (App. 60a).[23] Regardless of the manner in which the views expressed in *Green Valley* are denominated, they are entitled to great, and indeed controlling, weight, coming as they did only a short time after the Act was adopted by a distinguished Federal appellate court sitting at the hub of the market affected.

3. *The need for orderly judicial administration of pending and related litigation.* A further major reason for certiorari in this case is to enable this Court to direct the orderly disposition of related litigation in another circuit and thereby to eliminate those sub-

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[23] The court below suggested that the *Green Valley* court first held that plaintiffs there had no standing (App. 50a). In fact, the *Green Valley* court first upheld the differential as a market differential authorized under the Act, and then noted: "*Furthermore, we think* the Government is right in its contention that the present appellants have no standing to challenge the Order in this particular." (emphasis added.) (App. 71a).

stantial uncertainties regarding the Secretary's powers which currently plague all milk farmers in the affected northeastern markets. The validity of a farm location differential essentially the same as that involved in the instant case is now at issue before the Court of Appeals for the Second Circuit (Nos. 32,793-99), on appeal from a decision of the Federal District Court for the Northern District of New York in *Cranston* v. *Freeman* (App. 73a *et seq.*). The *Cranston* court upheld the validity of the differential in the Connecticut milk marketing order, 7 C.F.R. § 1015.72 (1968), finding:

> "3. The farm location differentials contained in Sections 1015.72(a) and (b) of the Order regulating the handling of milk in the Connecticut Marketing Area, 7 C.F.R. § 1015 (1968), are market differentials customarily paid by handlers subject to the Order and as such are authorized pursuant to Section 608c(5)(B) of the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. § 601, *et seq.*" (App. 132a).

A full hearing was held in the *Cranston* case. Sixteen witnesses testified covering nearly 1,000 pages of transcript. Expert testimony and documentary evidence was presented as to: milk marketing practices in the '20s and '30s, including techniques later utilized in Federal regulatory programs; the economic crisis precipitating a need for Federal legislation to reestablish orderly and stable milk marketing conditions; the full legislative history of the 1933, 1935 and 1937 Acts; and the administrative history of the Secretary's use of farm location differentials under the pre-1935 licenses and, subsequently, the Federal order programs.

With the benefit of this full record and elucidation of the intricacies of milk marketing and the history of regulation, the *Cranston* court sharply differed with

the views below which were dependent on an undeveloped record compiled in summary judgment proceedings. The *Cranston* court acknowledged its conflict with the reasoning of the Court of Appeals for the District of Columbia in *Blair* v. *Freeman* (on which the same lower court relies in the instant case) and carefully analyzed the basis for its differences:

> "Despite the differences in fact, the Court recognizes that its holding is based on conclusions which are contrary to those reached in *Blair*. The Court is indeed reluctant to disagree with such a distinguished court as the Court of Appeals for the District of Columbia and does so only with the greatest respect and deference. But while the Court concurs with the Court of Appeals for the District of Columbia that the uniform price requirement was designed to eliminate ruinous competition for the fluid milk market, it cannot concur in the Court of Appeals conclusion that the requirement prohibits recognition of the historic fact that farmers located in particular areas near the market were accorded a greater share of that market." (App. 118a).

The divergence between the two courts on legislative intent, facts of milk marketing, and interpretation of prior precedents is illustrated below:

Zuber	*Cranston*
(1) *Interpreting Committee Reports.*	
"The Committee Reports in respect of the 1935 Act are explicit that 'the market differential is a differential which is given to the producer to compensate him for delivering his milk to a city market instead of to a country plant.'" (App. 54a).	"In view of these remarks by Senator Murphy, and in view of the testimony of two of the drafters of the statutory language in question, and considering the expressions of intent in the Committee reports that local variations and past practices under cooperative and licensing agreements should continue, the Court concludes that

Zuber	*Cranston*
	the narrow definition of market differentials contained in the committee reports must be read as illustrative rather than as restrictive." (App. 100a).
(2) *Construction of Section 4 of 1937 Act.*[24]	
". . . this construction is consistent with what was clearly the sole legislative purpose underlying Section 4, namely, to prevent technical abatements which arguably might result from reenactment of the 1933 Act." (App. 49a).	"What otherwise might be a meritorious argument that Congress simply intended to prevent technical abatement of prior orders is countered by the House of Representatives committee report accompanying the proposed legislation .... [quoting report]. The first sentence makes it clear that Congress indeed wished to avoid technical abatements, but the second sentence by use of the word 'also' demonstrates that Section 4 was further designed to ratify, legalize and confirm affirmatively the provisions of past orders. In addition, the cases cited in the report all involved instances in which Congress had legalized or ratified prior executive action; none of them were concerned with mere technical abatement." (footnote omitted.) (App. 106a-107a).

[24] Section 4 of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 3672(a), expressly ratifies, legalizes and confirms earlier marketing orders. As such, it lends added and independent support to the validity of the farm location differential which was included in the 1936 Boston milk order.

Zuber

(3) *View of Rock Royal decision.*

"*Rock Royal* did not involve producers, but only handlers and therefore a different provision of the statute. Moreover, the differential payments there involved depended upon the location of the plant to which delivery was made, and not the location of the delivering farmer." (n. 40.1 at App. 57a).

Cranston

"It is true that *Rock Royal* was a suit involving handlers and not producers and that Section 8c(5)(A) applies to the former rather than the latter. But Section 8c(5)(A) provides for the same uniform prices subject to the same adjustments as set out in identical language in Section 8c(5)(B) applying to producers. Therefore, the Supreme Court's holding that Section 8c(5)(A) 'authorizes such an arrangement' is most certainly authority that Section 8c(5)(B) authorizes the same arrangement." (App. 113a).

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"Furthermore, as was pointed out in connection with a similarly worded differential in the first Boston license of 1933, delivery to plants in those counties meant that the farms from which the deliveries were made were located there. In fact those persons involved with the differential always spoke of it as a differential paid on the basis of farm location." (App. 112a).

Zuber	*Cranston*
(4) *History of Nearby Differential.*	
"First, it does not appear that a farm location differential of the kind now under attack ever appeared in a greater Boston license or order before 1937. There were differentials based on *delivery* location, and for a time farm location was one condition along with delivery location, but none seems to have been based on farm location alone." (App. 48a).	"But, as a number of witnesses testified, only producers whose farms were nearby the city could deliver to the city plants because of the delivery methods then in existence. The others had to deliver to country stations and therefore did not receive the preferential base. The result was that the license [under 1933 Act] in effect provided for a differential to producers with nearby farms." (App. 101a).
	• • •
	"Thus, this differential [1936 Order] was unquestionably based solely on the location of a producer's farm." (App. 103a).

The contrast in the views of these courts on basic aspects of milk marketing foreshadows a possible conflict between the Court of Appeals for the District of Columbia Circuit and the Second Circuit Court of Appeals, in addition to the already existing conflict of the lower court here with the First Circuit Court in *Green Valley*. Review by this Court would eliminate the anomalous prospect that the Secretary might well find himself authorized to maintain a farm location differential in the Connecticut market while being precluded from doing so in the adjacent Massachusetts-Rhode Island area.

4. *The conflict in principle between the decision below and this Court's decision in United States* v. *Rock Royal Co-op., Inc., 307 U.S. 533.* The authorized use by the Secretary of a farm location or "nearby" differential is not a novel question before this Court. In sharp contrast to the ruling below which found that ". . . any discrimination attributable to farm location would appear to be invalid" (App. 58a), this Court has expressly confirmed the validity of a differential based on farm location. In *Rock Royal,* this Court held:

> "C. *Nearby Differentials.* Provision is made by the Order for special differentials of 20 cents on milk from certain counties located most favorably to the marketing area. This is to enable handlers to pay the producers at these plants. The five cent difference is absorbed by the handlers. The Act authorizes such an arrangement. § 8c(5)(A)." (footnotes omitted). 307 U.S. at 567.

Rock Royal specifically argued on brief to this Court (Br. of Rock Royal, Oct. Term, 1938, No. 771, p. 55) that such a differential was a preference unauthorized by the statute and prohibited by the language of § 608c(5)(B)(ii) of the Act "irrespective of the uses made of such milk by the individual handler," precisely the statutory language on which the lower court here bases its concept of congressional prohibition. The Government on brief (Br. of U.S., Oct. Term, 1938, No. 771, pp. 60-61) argued "milk of producers in these counties is readily available for use in the fluid market and producers in these counties have always enjoyed an almost exclusively fluid market, not by reason of accidents of competition but by reason of their natural advantages," plainly admitting that the

"sales advantage for fluid use" condemned by the ruling below (App. 52a) was a factor upon which the differential depended.[25]

The district court in *Rock Royal* found the differential to be "preferential payments made to producers *living* in 18 counties . . . . The producers in those counties receive 20 cents per cwt. in addition to the location differentials, which return them a higher price for their milk *because they are located nearer New York.*" (emphasis added) 26 F.Supp. 534 at 554. The parties took no exception to this district court finding. The preference was based in fact upon *location of*

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[25] On this point, this Court in *Rock Royal* recognized that the very adjustment provisions of the Act and the New York order (which distributed differing proportions of the equalization pool to different classes of producers based upon fluid use advantages) were provisions serving to protect the Act and the order from invalidity as an exercise in arbitrary equalization.

In dealing with the defendants' challenge to the validity of the equalization pool provisions, this Court described the operation of the market wide pool of the New York order in the following terms:

> "The result of the use of the device of an equalization pool is that each producer, dealing with a proprietary handler, gets a uniform or weighted average price for his milk, with differentials for quality, location or other usual market variations, irrespective of the manner of its use. The Act, § 8c(5)(B)(ii) and (C) and the Order, Articles IV., VI. and VII. authorize such an adjustment." 307 U.S. at 571.

It is notable that this Court referred to differentials "for usual *market variations*" in the plural as contrasted with the limited interpretation placed on market differentials by the lower court here. It is also significant that this Court expressly held that § 8c(5)(B)(ii) and the particular provisions of the order setting out the nearby differential authorize the adjustment.

the farm for the reason discussed by the Government brief (Br. of U.S., Oct Term, 1938, No. 771, p. 60) to this Court in *Rock Royal*—a range of mountains made delivery to the plants feasible only for farmers residing in the 18 counties. The validity of the nearby differential was thus posed to this Court as a preference *based upon farm location.* On that basis, this Court held it to be a differential authorized by the Act.

The lower court's footnoted attempt to distinguish *Rock Royal* (n. 40.1 App. 57a) is superficial and unfounded. To say that *Rock Royal* only involved handlers and therefore a different provision of the statute is a misleading over-simplification. *Rock Royal* itself was a producer's cooperative, the membership of which consisted entirely of producers. It was, as this Court stated, considered as a handler for the purposes of payment for milk under the Act but one of its main complaints was that its members were differentiated against under § 608c(5)(B)(ii) of the Act. This Court held such differentiation to be authorized. Moreover, inasmuch as Subsection (A) provides for the *same* uniform prices subject to the *same* adjustments as set out in identical language in Subsection (B) applying to producers, this Court's holding that Subsection (A) "authorizes such an arrangement" is virtually conclusive that Subsection (B) authorizes the same arrangement.

The court below also distinguished *Rock Royal* on the grounds that the differential there depended upon plant, and not farm, location (n. 40.1 App. 57a). However, as noted above, both the district court and the parties treated the differential as what it, in fact, was —an adjustment based entirely on the location of producers' farms. In sum, the view of the court below

that any differential based on farm location must fall is irreconcilable with the holding of this Court in *Rock Royal* that a differential which in fact was based on farm location was valid.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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